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NO. 80-2120

IN THE

Supreme Court of the United States

October Term, 1980

JOHNNY WITT

and

SARAH B. BOWMAN,
Petitioners

v.

CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, and CALVIN HARBOUR, INDIVIDUALLY,

LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, and LARRY E. BALILES, INDIVIDUALLY,

MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, and MARTHA SUE FAIN, INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Robert W. Mann
YOUNG, KISER, HASKINS, MANN,
GREGORY & YOUNG
60 West Church Street
Martinsville, VA 24112
(703) 638-2367

Counsel for Petitioners

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

QUESTIONS PRESENTED FOR REVIEW

The Complaints (as amended), brought pursuant to 42 U.S.C. §1983, allege that reckless, malicious conduct, by persons acting under color of state law, caused indictments and arrests without probable cause. The complaints were dismissed on the pleadings as not stating a cause of action against any of the individual Defendants or the Defendant County, simply because the Plaintiffs had been indicted, even though the indictments were obtained recklessly and by perjured testimony. The questions thus presented are:

(1) Whether a State Grand Jury indictment conclusively establishes probable cause for an arrest warrant, so as to insulate and shield the Defendant perpetrators from otherwise clear §1983 liability, even though the

Defendants themselves procured the indictments recklessly, maliciously, and on admittedly perjured testimony.

(2) Whether a Complaint alleging the aforesaid reckless conduct as an "official policy" and/or "custom" of the County states a cause of action against the political subdivision.

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OPINIONS BELOW

The opinion of the District Court for the Western District of Virginia is unreported and unpublished and appears as Appendix B, infra, pp. 49. The opinions of the United States Court of Appeals for the Fourth Circuit affirming the District Court and denying a rehearing are unreported and unpublished and appear as Appendices C and D, infra, pp. 62 and 66, respectively.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered February 17, 1981. The order denying a rehearing was entered March 17, 1981. This Petition was filed within ninety (90) days of March 17, 1981.

Jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following amendments to the United States Constitution provide in pertinent part:

AMENDMENT IV: The right of the people to be secure in their persons. . . against unreasonable . . . seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the . . . persons. . . to be seized.

AMENDMENT XIV: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

AMENDMENT V: No person shall be. . . deprived of life, liberty, or property,

without due process of law. . . .

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

STATEMENT OF THE CASE

Plaintiffs, Witt and Bowman, originally instituted separate §1983 actions each requesting a separate trial by jury. Because of similarity of fact and identity of issues, the cases were

consolidated for hearing in the Court of Appeals.

Both Complaints, alleging arrest without probable cause, were dismissed on the pleadings by the District Court, which action was affirmed by the Fourth Circuit Court of Appeals.

In so doing, the Courts below have held that in determining "probable cause" in a §1983 action, it is not permissible to challenge the motives and actions of the state officers in procuring a wholly unfounded indictment, nor is it even permissible to challenge the truthfulness of factual statements made to the grand jury whose indictments were the sole basis of the arrest warrants.

The §1983 Complaints (as amended), brought in the first instance under 28 U.S.C. 1331(a) and §1343, set forth the anticipated proof in considerable detail.

To summarize as in the Trial Court's Memorandum Opinion and the Fourth Circuit Opinion is an injustice to the Plaintiffs' case. It is fundamental that, for the purpose of a motion on the pleadings, all facts alleged, and all reasonable inferences therefrom, must be viewed in the light most favorable to the Plaintiffs and accepted as true.

In Owens v. Haas, 601 F2d 1242 (2nd Cir. 1979), cert. denied sub nom, 100 S. Ct. 483 (1980) it was affirmed that:

> "[a]n action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts which could be proved in support of their claims." P. 1247. (Emphasis added).

At the risk of oversimplification, the Complaints allege that Defendant Fain, an undercover agent, acting under color of state law, maliciously perjured

herself before the grand jury causing the indictment and arrest of the Plaintiffs. In this, she testified that she had purchased contraband from each of the Defendants, when in truth and fact she had not even talked with the Defendants. Defendant Fain later plead guilty to perjury.

Fain's supervisors, Defendants Harbour and Baliles, acted callously and recklessly in that they actually knew Defendant Fain was incompetent and wholly unreliable, and nevertheless authorized her to make unsupervised "buys" of contraband.

Defendants recklessly sought and procured indictments based on Fain's known unreliable, uncorroborated testimony, despite specific warnings not to do so.

Plaintiffs were totally innocent of any crime whatsoever. They were not even

bona fide suspects, but they were nevertheless arrested on warrants issued solely by reason of the ill-gotten indictments.

The Amended Complaints further alleged that this reckless course of conduct was the "policy" and "custom" of the County so as to make the political subdivision liable therefor.

Because the Courts below held, with respect to the first question presented, that the Defendants were insulated from liability in that the indictments conclusively established probable cause, consideration of the second question presented was not necessary to the opinions below. However, if this Honorable Court deems it appropriate to review the first question, guidance is respectfully sought with respect to the second question pertaining to the County's liability.

ARGUMENT FOR ALLOWANCE OF A WRIT

1. THE DECISION OF THE FOURTH CIRCUIT IN THE CASES UNDER CONSIDERATION IS IN DIRECT CONFLICT WITH DECISIONS OF THE SEVENTH AND FIFTH CIRCUITS ON THE SAME SUBJECT MATTER:

The Courts below have held that since the Plaintiffs were "indicted", even though such indictments were procured by perjury, and through reckless, callous disregard, the ill-gotten indictments themselves preclude the §1983 actions.

The pivotal issue is then whether officers acting maliciously, or with callous, wanton recklessness, under color of state law, can insulate themselves (and the County) from liability that would otherwise clearly attach, simply by their own irresponsible and perjured procurement of the Grand Jury's stamp of approval.

The same argument made by the Defendants herein was advanced and

summarily rejected in Attreau v. Morris, 357 F2d 871 (7th Cir. 1966), a §1983 case, where the Court stated:

> "Contrary to Defendants' argument, we hold that the fact th.t the Plaintiff was indicted does not preclude this suit. . . . [citing the fact that Defendants cited no federal authority for their contention and the fact that under state law an indictment is not an absolute bar to a malicious prosecution action, the Court went on to say] we hold as federal law that the indictment of Plaintiff did not preclude this action." Pp. 874, 875. (Brackets added for context and emphasis added).

It would seem obvious that the loose, ex parte, much maligned, often abused grand jury system should not be the final arbiter of constitutional rights. The Defendant Fain knew she was not telling the truth, the Grand Jury had no such knowledge. The Defendants Harbour and Baliles themselves knew that the Defendant witness Fain was unreliable, the Grand Jury did not know this. The Defendants Harbour

and Baliles themselves had been warned not to believe the Defendant witness Fain, the Grand Jury had no such warning. The Defendants Harbour and Baliles themselves knew the Defendant Fain had lied on official police matters, the Grand Jury was not privy to this information.

Based on the limited submission which the Defendants Harbour and Baliles chose to give the Grand Jury, it was predictable to an absolute certainty that the Plaintiffs would be indicted and consequently would be arrested and lose their liberty. The entire debacle from the beginning to the end was caused by callous disregard characterized by an irresponsible and unwarranted course of conduct made possible only by those acting under color of state law.

The Courts below have concluded as a blanket, no exceptions proposition that a grand jury indictment, however

obtained, is probable cause as a matter of law, thus avoiding otherwise obvious infringements on constitutional guaranties.

Until the decision now under consideration was rendered, no Court has ever held, nor even intimated, that an indictment, procured by deliberate or reckless falsification, would constitute probable cause as a matter of law, thus shielding the perpetrating wrongdoers from civil liability.

Rodriguez v. Ritchey, 556 F2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047, is the sole case relied on by the Defendants for this rather anomalous proposition.

However, the Rodriguez decision is based on an entirely different, easily distinguishable factual predicate. In Rodriguez, the complaint merely alleged simple negligence leading to

indictment and false arrest, whereas the instant cases allege malicious, reckless, callous disregard leading to indictment and false arrest.

Under circumstances limited to allegations of mere negligence, the Fifth Circuit held that judicial inquiry in a §1983 action could not go behind the indictment on the issue of probable cause for arrest.

Significantly, Rodriguez was a 7-6 en banc decision, even where simple negligence was in issue. Even more significantly, Judge Hill, one of the seven-member majority, wrote a separate concurring opinion stating:

> ". . . I do not wish to stamp my imprimatur [on the analysis] that indictment by a properly constituted grand jury immunizes all precedent conduct of investigative and prosecutorial authorities. . . . [S]hould an officer maliciously or in bad faith seek to obtain an indictment from a grand jury, I am not now prepared to state

> that he should be allowed to escape responsibility by showing that he did such a good job that the grand jury indicted. Rodriguez supra, pp. 1194, 1195. (Emphasis and brackets added).

By any definition, actual malice can be proven against the Defendant Fain in giving perjured testimony against Plaintiff Bowman because of a personal grudge, and for lying under oath against Plaintiff Witt simply to satisfy her superiors.

It is conceded that the Plaintiffs cannot prove, nor have they alleged, actual prior knowledge on the part of Defendants Harbour and Baliles that Defendant Fain was in fact lying on these particular occasions.

Although this concession may eliminate mala in se as to Defendants Harbour and Baliles, in light of their positions of authority, the callous, irresponsible conduct of these officers

is even more insidious than that of the Defendant Fain. It was their duty to hire reliable agents, to follow accepted procedures, to heed the many warnings and to properly train and supervise their subordinates. McClelland v. Facteau, 610 F2d 693 (10th Cir. 1979), Sims v. Adams, 537 F2d 829 (5th Cir. 1979). Their failure to do so is a classic example of deliberate indifference for the foreseeable consequences, including the loss of liberty by innocent citizens.

2. IN SUMMARILY DISMISSING THE COMPLAINTS, THE COURTS BELOW HAVE REFUSED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE SUPREME COURT:

It is fundamental that there can be no probable cause unless the information is reliable and the informant credible. Aguilar v. Texas, 378 U.S. 108 (1964). In the instant cases we have neither.

In Pritchard v. Perry, 508 F2d 423 (4th Cir. 1975), the Fourth Circuit

correctly acknowledged that when one is arrested without probable cause his loss of liberty is redressable under §1983. But in the instant cases, the Fourth Circuit says the Plaintiffs should be left to their remedies under state law. In thus avoiding the issue the Courts below overlook that §1983 rights are independent of and supplementary to any cause of action that the Plaintiff may have had under State law. See, e.g., Steffel v. Thompson, 415 U.S. 452 (1974); Wilwording v. Swenson, 404 U.S. 249 (1971).

In affirming the Trial Court's summary dismissal, the only case cited in the Fourth Circuit opinion is Baker v. McCollan, 443 U.S. 137 (1979), a case which has absolutely no bearing on the issue at hand. Baker stands for the admittedly correct proposition that there can be no cause of action under §1983 based on mere detention, after arrest,

if there was in truth and fact probable cause for the arrest. In the instant case, it is alleged that there was no probable cause for arrest, the only "probable cause" being a deliberate lie told by a state agent inducing a grand jury to indict and thereby predictably causing the arrest of innocent citizens.

The constitutional issue thus presented is whether state agents can maliciously and/or recklessly cause the arrest of innocent citizens, and simultaneously insulate themselves from §1983 liability simply by reason of the existence of indictments, which indictments were procured solely on the basis of the Defendants' own wrongdoing.

The Courts below have simply refused to address the foregoing all important, pivotal issue, which should now be decided by this Honorable Court.

It is respectfully submitted that the abuse of power alleged is the precise type of conduct which the Civil Rights Act specifically intended to proscribe.

3. ALTHOUGH THE PRECISE ISSUE IS ONE OF FIRST IMPRESSION FOR THIS HONORABLE COURT, THE DECISION BELOW CONFLICTS WITH SIMILAR, APPLICABLE PROBABLE CAUSE PRINCIPLES PREVIOUSLY DECIDED BY THE SUPREME COURT:

Although the Supreme Court of the United States has not addressed the issue directly as it pertains to a civil rights action, in Franks v. Delaware, 438 U.S. 154 (1978) a similar principle was essentially decided directly contrary to the Fourth Circuit's per curiam decision.

The issue in Franks was whether an ill-gotten affidavit, which included falsification, conclusively established probable cause for a search warrant. Here, the issue is whether a similarly ill-gotten indictment conclusively establishes probable cause for an arrest warrant.

The Supreme Court of Delaware had held that under no circumstances could a criminal defendant challenge the veracity of a sworn statement used by police to procure a search warrant. This Honorable Court reversed, noting at the onset that the case presented an "important and longstanding issue of Fourth Amendment law". This Court held that the issue of probable cause is subject to challenge, despite an affidavit valid on its face, if there are allegations of "deliberate falsehood" or of "reckless disregard for the truth".

In Franks, this Court essentially held that the good faith and veracity of law enforcement officials is so necessary that it may in fact transcend the importance of convicting the guilty. It is respectfully submitted that such good faith and veracity is equally important in protecting the civil rights of innocent

citizens who have been arrested by malicious and/or reckless actions of those acting under color of state law.

Said this Court in Franks:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a truthful showing."
>
> . . . .
>
> ". . . it would be an unthinkable imposition upon [the authority of the independent third party, in this case a magistrate] if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment." Pp. 161, 162. (Brackets added for context).

Except in exigent circumstances, prior to search or an arrest, the Fourth Amendment requires a good faith submission to an independent third party for the determination of "probable cause".

It is constitutionally immaterial whether the third party is a magistrate

and the issue is probable cause in an affidavit for a search warrant; or, whether the third party is a grand jury and the issue is probable cause in an indictment for an arrest warrant. Both are ex parte proceedings and in the words of Justice Blackmun, "surely [the warrant clause] takes the affiant's good faith as its premise". Franks, p. 161.

In Franks, this Court disapproved "deliberate falsehood" and/or allegations of "reckless disregard for the truth," on the issue of determining probable cause, even though the independent third party magistrate supposedly provided a vanguard of protection for the citizenry.

In the case under consideration, we have both allegations of "perjury" and "reckless disregard" in a similar probable cause context.

4. THE CIRCUITS ARE IN MATERIAL CONFLICT AS TO THE SCOPE OF A POLITICAL SUBDIVISION'S §1983 LIABILITY UNDER MONELL AND ITS PROGENY:

All of the above-mentioned constitutional infringements are alleged to be attributable to an "official policy" and "custom", a continued pattern of misfeasance by the County's Sheriff's Department. It is alleged that the County systematically declined trained assistance and repeatedly retained incompetents to spearhead important undercover operations.

As the Second Circuit has interpreted Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), such allegations clearly state a cause of action against the County. See Owens v. Haas, 601 F2d 1242, (2nd Cir. 1979), cert. denied sub nom, 100 S.Ct. 483 (1980); Turpin v. Mailet, 48 U.S.L.W. 2714 (2nd Cir. 1980). Compare, however,

Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979); Edmonds v. Dillon, 485 F.Supp. 722 (N.D. Ohio 1980); and Smith v. Ambrogio, 456 F.Supp. 1130 (D. Conn. 1978).

CONCLUSION

Considering the liberal construction required of the Civil Rights Act, the aforesaid allegations clearly set forth triable causes of action for violation of rights under the Fourth Amendment and under the "fundamental fairness" embodied by the due process clause of the Fifth Amendment. For the above reasons, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

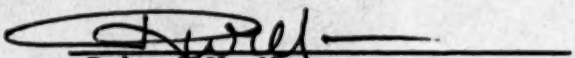
Respectfully submitted.

Robert W. Mann
Attorney for Petitioner
YOUNG, KISER, HASKINS, MANN,
GREGORY & YOUNG
60 West Church Street
Martinsville, VA 24112
(703) 638-2367

BY:
Robert W. Mann

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I am admitted to practice* before the Supreme Court of the United States and that I have this 15 day of June, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C., and have mailed the required copies of said petition for Writ of Certiorari to Mr. Thomas T. Lawson, of WOODS, ROGERS, MUSE, WALKER & THORNTON, 105 Franklin Road, S.W., Roanoke, VA 24004 and to Mr. Anthony P. Giorno, Assistant Commonwealth's Attorney for Patrick County, Stuart, VA 24171.



Robert W. Mann
Attorney for Petitioner

* to be admitted June 22, 1981

THE APPENDIX

APPENDIX A:

Complaints and Amended Complaint.

APPENDIX B:

Final Orders and Memorandum Opinion in the United States District Court for the Western District of Virginia.

APPENDIX C:

Unpublished Opinion of the United States Fourth Circuit Court of Appeals, February 17, 1981.

APPENDIX D:

Order of the United States Fourth Circuit Court of Appeals denying petition for rehearing and suggestion for rehearing en banc, March 17, 1981.

APPENDIX A. THE COMPLAINTS

(EXPLANATORY NOTE: Separate Complaints were originally filed by the Plaintiffs Witt and Bowman, and separate jury trials requested. Amended Complaints adding the County of Patrick as a party defendant were thereafter filed. Because of virtual identity of issues, the cases were consolidated in the District Court and in the United States Court of Appeals for the Fourth Circuit. The first seven paragraphs of the two original Complaints and the Amended Complaints are identical and, therefore, only the first seven paragraphs of Witt's Complaint and Witt's Amended Complaint are hereafter reproduced. Although the remaining paragraphs of the two original Complaints are substantially the same, the concluding paragraphs of both Complaints have been reproduced because of the differences in wording.)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Danville Division

JOHNNY WITT, Plaintiff, v. CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, and CALVIN HARBOUR, INDIVIDUALLY, LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, and LARRY E. BALILES, INDIVIDUALLY,	)))COMPLAINT)))))))

and

MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, and MARTHA SUE FAIN, INDIVIDUALLY,

Defendants.

Plaintiff respectfully alleges as follows:

1. The matter in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. This action rises under Title 42 of the United States Code §1983. This Court has jurisdiction pursuant to Title 28 of the United States Code §§1331 and 1343. The Plaintiff is a permanent citizen of Patrick County, Commonwealth of Virginia, at present residing in Richmond, Virginia. At all times pertinent to this Complaint, the Defendant Harbour was the duly elected Sheriff of Patrick County, Virginia, the Defendant Baliles was a duly appointed Deputy Sheriff of Patrick County, Virginia, and the

Defendant Fain was an agent and employee of the Sheriff's Department of Patrick County, Virginia. In doing the acts and things hereinafter set forth said Defendants were acting in their respective capacities as stated, under color of state law, and within the scope of their respective duties. All acts and omissions herein complained of occurred in the Western District of Virginia.

2. That during the late winter and spring of 1977, the Defendant Baliles, acting under the supervision and control of Defendant Harbour, commenced an investigation into possible illicit drug activity in and about Patrick County, Virginia. In this, Defendant Baliles solicited, procured and secured the assistance of Defendant Fain, with the knowledge and approval of Defendant Harbour. It was originally anticipated that Defendant Fain would help the Sheriff's Department in contemplated

investigative efforts by acting in the limited capacity of what is commonly known and referred to as an "informant".

3. Prior to the winter and spring of 1977, and at all times pertinent hereto, the Defendant Fain was well known in the community in which she lived, and in the circles in which she moved, as a person who was emotionally unstable and totally unreliable. In fact, Defendant Fain had no training or experience whatsoever in regard to her projected role and was mentally and emotionally hopelessly unfit for the law enforcement responsibilities contemplated, all of which was known, or should have been known, to the Defendants Harbour and Baliles.

4. During her relatively short tenure in the limited capacity as a mere "informant", the Defendant Fain demonstrated incompetency and unreliability in that, among other things, she repeatedly supplied

the officers with insufficient, false and misleading information. The Defendant Fain's failings and shortcomings were repeatedly made known to the Defendants Baliles and Harbour and her unreliable reputation became a matter of common knowledge even within the Sheriff's Department. Several responsible officers declined to pursue investigative efforts in matters in which the Defendant Fain had participated, or in which she was participating.

5. Notwithstanding her failure as an "informant", and totally undaunted by specific warnings and an ever widening reputation for unreliability, the Defendant Baliles, acting under the supervision and control of Defendant Harbour, proceeded to give to the Defendant Fain additional, extremely important and more demanding duties and responsibilities, without formal training of any kind, and with woefully inadequate informal briefing. The Defen-

dant Fain was thereby made an "undercover agent" of the Sheriff's Department and was imbued with the duties and responsibilities normally and properly delegated to the most skilled and highly trained officers. That the intended role of undercover agent was demanding and could not be delegated to irresponsible persons was well known to Defendants Harbour and Baliles because of a previous ill-fated, scandalous drug investigation. In the aforesaid instance, said Department had entrusted important undercover duties to an untrained, irresponsible individual, the end result being that numerous criminal prosecutions were aborted because of the previous agent's conduct. In this new responsibility, among other things, the Defendant Fain was charged with the responsibility of making "buys" from suspected drug sellers, securing the contraband for evidence, all with a view toward criminal

prosecution in a court of law based on the uncorroborated efforts of the Defendant Fain.

6. Throughout her tenure as "undercover agent" the Defendant Fain continued to demonstrate unreliability and incompetence. Recognizing to some extent her own shortcomings, she entreated the Defendant Baliles to relieve her of her duties, which request was steadfastly refused even though Defendant Baliles was independently warned by other officers of her lack of reliability and competence. Notwithstanding Defendant Fain's request to be relieved, and in total disregard and indifference to the rights of the public, the Defendant Baliles, and other members of the Sheriff's Department who were active in the ongoing investigative effort, continued to pressure the Defendant Fain for successful drug acquisition results.

7. Proceeding without training or experience in an ill-fated effort to accomplish the desired "results", the Defendant Fain was unable to make sufficient bona fide drug buys to satisfy her superiors. Being frustrated, afraid, and confused, the Defendant Fain then embarked on an intentional, voluntary course of wilful fabrication and perjury directed at unsuspecting, totally innocent, citizens in the community.

(NOTE: WITT'S COMPLAINT CONTINUES)

8. During the course of her undercover work aforesaid, the Defendant Fain's attention was directed, without probable cause, to the Plaintiff. Having been instructed by her superiors to "get Johnny Witt" the Defendant Fain tried, by telephone on several occasions, to purchase drugs from the Plaintiff. On each such occasion, Defendant Fain was summarily rebuffed and rejected by the Plaintiff

who advised her in no uncertain terms that he did not have access to drugs and did not want to have anything to do with the Defendant Fain and her ostensible need for drugs.

9. Thus unable to make a legitimate "buy" from the Plaintiff, but still being pressured to do so, the Defendant Fain falsely related and falsely reported to her superiors in charge of the investigative effort that she had in fact made two, unrelated, separate buys of marijuana from the Plaintiff Witt, when in truth and fact no such buys had been made. In this, among other things, the Defendant Fain supplied marijuana for use as evidence in Court from a source best known to her and falsely reported it had been obtained from the Plaintiff Witt.

10. Notwithstanding her reputation, demonstrated lack of reliability, and warnings not to rely on the findings and

reports of Defendant Fain, the Defendants Baliles and Harbour accepted the reports of the Defendant Fain without question or reservation. Despite specific warnings not to do so, the Defendants Harbour and Baliles sought and obtained felony indictments against the Plaintiff Witt, and other innocent citizens, based solely on the false, perjured, unfounded testimony of the Defendant Fain.

11. The two indictments were made public and a criminal warrant issued for the arrest of Plaintiff Witt, who had no previous knowledge of the felony accusations against him and was completely innocent thereof. Plaintiff Witt had theretofore been an exemplary citizen and enjoyed an excellent reputation. All indictments against the Plaintiff Witt were subsequently dismissed, without trial, when the Defendant Fain finally admitted her fabrications and false testimony, but

not until the innocent Plaintiff had unnecessarily suffered great humiliation, embarrassment, inconvenience, and anguish, all to his permanent shame and damage.

12. The Defendants Baliles and Harbour were charged with the usual ordinary expected constitutional duties attendant their respective offices, including responsibilities to the Plaintiff and the public in general. At all times pertinent hereto, said Defendants knew, or with the most perfunctory exercise of care should have known, the lack of reliability, incompetence and general inability of the Defendant Fain to perform the important, difficult, critical requirements of law enforcement being entrusted to her. Notwithstanding this, the Defendants Harbour and Baliles delegated said responsibility to the Defendant Fain in total disregard and callous indifference to the foreseeable consequences and the constitu-

tionally protected rights of Patrick County citizenry. In so doing, the employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the Plaintiff Witt, and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the Plaintiff Witt of his right and privilege to be secure in his personal liberty; to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public

disdain and ridicule; and, be secure in his good name, reputation, honor and integrity.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for compensatory damages in the sum of One Hundred Thousand Dollars ($100,000), and punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000).

JOHNNY WITT

By_____
Of Counsel

(NOTE: BOWMAN'S COMPLAINT CONTINUES)

8. Thus unable to make sufficient legitimate "buys" to satisfy her superiors, but still being pressured to do so, the Defendant Fain falsely related and falsely reported to her superiors in charge of the investigative effort that she had in fact made two, unrelated, separate buys of illicit drugs from the Plaintiff Bowman,

when in truth and fact no buys had been made. In this, among other things, the Defendant Fain supplied drugs for use as evidence in Court from a source best known to her and falsely reported it had been obtained from the Plaintiff Bowman. The Defendant Fain had singled out the Plaintiff Bowman as a target of the unwarranted charges because of a personal grudge and dislike for Plaintiff Bowman.

9. Notwithstanding her reputation, demonstrated lack of reliability, and warnings not to rely on the findings and reports of Defendant Fain, the Defendants Baliles and Harbour accepted the reports of the Defendant Fain without question or reservation. Despite specific warnings not to do so, the Defendants Harbour and Baliles sought and obtained felony indictments against the Plaintiff Bowman, and other innocent citizens, based solely on the false, perjured, unfounded testimony

of the Defendant Fain.

10. The two indictments were made public and a criminal warrant issued for the arrest of Plaintiff Bowman, who had no previous knowledge of the felony accusations against her and was completely innocent thereof. All indictments against the Plaintiff Bowman were subsequently dismissed, without trial, when the Defendant Fain finally admitted her fabrications and false testimony, but not until the innocent Plaintiff had unnecessarily suffered great humiliation, embarrassment, inconvenience, and anguish, all to her permanent shame and damage.

11. The Defendants Baliles and Harbour were charged with the usual ordinary expected constitutional duties attendant their respective offices, including responsibilities to the Plaintiff and the public in general. At all times pertinent hereto, said Defendants knew, or with

the most perfunctory exercise of care should have known, the lack of reliability, incompetence and general inability of the Defendant Fain to perform the important, difficult, critical requirements of law enforcement being entrusted to her. Notwithstanding this, the Defendants Harbour and Baliles delegated said responsibility to the Defendant Fain in total disregard and callous indifference to the foreseeable consequences and the constitutionally protected rights of Patrick County citizenry. In so doing, the employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the Plaintiff Bowman, and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and

Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the Plaintiff Bowman of her right and privilege to be secure in her personal liberty, to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public disdain and ridicule.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for compensatory damages in the sum of Thirty Five Thousand Dollars ($35,000), and punitive damages in the sum of One Hundred Fifty Thousand Dollars ($150,000).

SARAH B. BOWMAN

By_____
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Danville Division

JOHNNY WITT, Plaintiff v. CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, AND CALVIN HARBOUR, INDIVIDUALLY, LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, AND LARRY E. BALILES, INDIVIDUALLY, MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, AND MARTHA SUE FAIN, INDIVIDUALLY, and THE COUNTY OF PATRICK, VIRGINIA, Defendants	AMENDED COMPLAINT

Plaintiff respectfully alleges as follows:

COUNT I

1. The Plaintiff incorporates by reference the entirety of the Complaint

previously filed by him against Calvin Harbour, Larry E. Baliles and Martha Sue Fain to be read as a part hereof as if set forth verbatim. A copy of said Complaint is attached as Exhibit A. Pursuant to the applicable law at this time, it is now alleged that the amount in controversy exceeds the sum of $15,000.00 exclusive of costs and interest.

2. The County knew, should have known, or had imputed knowledge of the allegations aforesaid, including particularly but not limited to paragraph 5. Such conduct by parties acting for and under the supervision of the County constitutes a pattern and custom of direct misfeasance and/or nonfeasance in failing to train, supervise and review and discipline members, agents and employees of the Sheriff's Department.

3. The County's supervision and training of such department's members,

agents and employees was so severely deficient as to reach the level of gross negligence and/or deliberate indifference making deprivation of constitutional rights foreseeable and probable.

COUNT II

1. The Plaintiff incorporates by reference the entirety of the Complaint previously filed by him against Calvin Harbour, Larry E. Baliles and Martha Sue Fain to be read as a part hereof as if set forth verbatim. A copy of said Complaint is attached as Exhibit A. Pursuant to the applicable law at this time, it is now alleged that the amount in controversy exceeds the sum of $15,000.00, exclusive of costs and interest.

2. The Sheriff, as a duly elected law enforcement official of the County was imbued with the duty and responsibility of setting and carrying out the policy of the County as to law enforcement, including

said County's policy as to undercover operations. In this context, the Sheriff's edicts and acts represent the County's official policy.

3. In discharge of said duty and responsibility the Sheriff acted with gross negligence and in reckless disregard of the constitutional rights of citizenry in setting and maintaining a policy and pattern of substandard, severely deficient undercover operations which foreseeably would result in violation of those rights.

WHEREFORE, Plaintiff demands judgment against the Defendant County, jointly and severally with Defendant's previously named, for compensatory damages in the sum of One Hundred Thousand Dollars ($100,000), and punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000).

JOHNNY WITT

By_____
Of Counsel

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

SARAH B. BOWMAN
Plaintiff

vs. CIVIL ACTION NO. 79-0058

CALVIN HARBOUR, Sheriff
of Patrick County
LARRY E. BALILES, Deputy
Sheriff
MARTHA SUE FAIN, Employee
of Sheriff's Dept. FINAL ORDER
COUNTY OF PATRICK, VIRGINIA
Defendants

This case is before the Court on the motion of the defendants to dismiss.

It appearing to the Court that the allegations in the complaint are similar, if not identical to the claims asserted in the case of Witt vs. Harbour, et. al. Civil Action No. 79-0057, and that the Court's ruling in the Witt case is controlling herein:

It is accordingly ADJUDGED and ORDERED as follows:

(1) That a copy of the Court's Opinion in Witt vs Harbour, Civil Action No. 79-0057, filed on April 23, 1980, be placed in this file.

(2) That the complaint be dismissed and stricken from the docket of the Court for the reasons stated by the Court in the Witt opinion.

Enter this 23rd day of April, 1980.

James C. Turk

CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JOHNNY WITT

Plaintiff

CIVIL ACTION NO.
79-0057 (D)

v.

F I N A L O R D E R

CALVIN HARBOUR, et al

Defendants

In accordance with the court's Memorandum Opinion this date entered, plaintiff's complaint is dismissed and this case is ordered stricken from the docket.

DATED: This 22nd day of April, 1980.

James C. Turk

Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JOHNNY WITT
Plaintiff

CIVIL ACTION NO.
79-0057(D)

v.

MEMORANDUM OPINION

CALVIN HARBOUR,
et al
Defendants

BY:
James C. Turk, Chief
U. S. District Judge

Plaintiff, Johnny Witt, brings this action pursuant to Title 42 § 1983, naming as defendants the County of Patrick, Virginia, the County Sheriff, Calvin Harbour, a deputy, Larry E. Baliles, and an employee, Martha Sue Fain. Plaintiff maintains that Miss Fain falsified evidence against him which led to his indictment and arrest and for this reason and because of his innocence, charges have been dropped. The County, Sheriff Harbour, and Deputy Sheriff Baliles, have been joined as defendants on the theory that their actions in failing to supervise Miss Fain evinced reckless dis-

regard for the rights of others in general and plaintiff in particular. The County of Patrick has moved to dismiss maintaining that it has neither the responsibility nor the right under Virginia law either to train or control the actions of the County Sheriff and his deputies. Sheriff Harbour and Deputy Baliles have moved to dismiss maintaining that the bases of plaintiff's action are claims of defamation and negligent deprivation of liberty although "[t]he former has been held an inappropriate basis for a § 1983 suit . . .[1] [and] the latter is not actionable when, as here, it allegedly contributes to a grand jury indictment." Finding no violation of a constitutional right, the court will dismiss.

"The first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the

Constitution and laws'" of the United States. Baker v. McCollan, 99 S.Ct. 2689, 2692 (1979); Martinez v. California, 100 S.Ct. 553, 558 (1980). When a person is sued for reckless supervision, the inquiry, of course, must begin with an examination of the conduct of the subordinate who is alleged to have violated plaintiff's constitutionally protected rights. That is, assuming that defendant Fain was the moving force in initiating criminal proceedings against plaintiff knowing him to be innocent, what constitutional guarantee, if any, did she infringe?

The Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches, Giordenello v. United States, 357 U.S. 480, 485-486 (1958) and its proscriptions are applicable to the states through the Fourteenth Amendment. Wolf v. Colorado,

338 U.S. 25, 27-28 (1949); Pritchard v. Perry, 508 F.2d 423, 424 (4th Cir. 1975). See Baker v. McCollan, supra, at 2694. Consequently, violations of Fourth Amendment rights by persons acting under color of sate law are redressable under § 1983. Pritchard v. Perry, supra, at 424-425. However, "it has long been settled that an indictment by a properly constituted grand jury conclusively determines the existence of probable cause and provides the authority for an arrest warrant to issue." Rodriguez v. Ritchey, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978). The requirements of procedural due process were met, therefore, before plaintiff was deprived of his liberty.[2] Consequently, while the facts alleged would serve as a basis for civil action for malicious prosecution[3] and for the

criminal charge of perjury[4] against Miss Fain, they do not establish a violation of constitutional magnitude. That is, malicious prosecution by a person acting under the color of his or her office does not, by that fact alone, rise to constitutional proportions. Pollard v. Baskerville, 481 F.Supp. 1157, 1160 (E.D.Va. 1979); Curtis v. Rosso and Mastracco, Inc., 413 F.Supp. 804, 809 (E.D.Va. 1976); Pyles v. Keane, 418 F.Supp. 269, 276 (S.D.N.Y. 1976); Rosales v. Lewis, 454 F.Supp. 956, 960 (S.D.Iowa 1978). Contra, Voytko v. Ramada Inn of Atlantic City, 445 F.Supp. 315 (D.N.J. 1978). As the Supreme Court stated in Baker, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be

sought in state court under traditional tort law principles." Baker v. McCollan, supra, at 2695-2696. As there has been no deprivation of constitutional magnitude, neither defendant Fain's superiors nor the County[5] would be liable on the theory of reckless supervision[6] under § 1983. Accordingly, defendants' motion to dismiss must be granted.

DATED: This 22nd day of April, 1980.

James C. Turk

Chief United States
District Judge

* * *

FOOTNOTES

1. Paul v. Davis, 424 U.S. 693 (1976).

2. Plaintiff cites Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979) for the proposition that a person arrested without probable cause is denied rights under the Fourth and Fourteenth Amendments and can sue the responsible state authorities under §1983. That is undoubtedly a correct statement of law. However, in the present case, as in Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978), referred to above, an indictment preceded plaintiff's arrest, an event which conclusively establishes probable cause.

3. In the constitutional sense, to say that the return of an indictment conclusively establishes probable cause for a warrant of arrest to issue is not to say that if the true facts were known they would establish probable cause. Rather, it is to say that plaintiff has been afforded all the protection to which he is entitled under the Constitution. Under state tort law principles, the question is not whether it would be procedurely permissible to arrest the plaintiff, but whether the one who initiated or was responsible for initiating criminal proceedings has "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense."

Prosser, The Law of Torts, 4th Ed., §119. See Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 684, 152 S.E.2d 271, 275 (1967). It requires, therefore, "an honest belief in the guilt of the accused." Id. Munger v. Cox, 146 Va. 574, 131 S.E. 841, 844 (1926). Accordingly, one who commits perjury to obtain an indictment cannot by the return of that indictment assert that probable cause has been conclusively established; instead, the return of the indictment is merely evidence that probable cause exists and may be impeached by evidence that it was procured through perjury. See Restatement (Second) of Torts, §664(2); The Law of Torts, supra, §119, p. 846; Westreich v. McFarland, 429 F.2d 947, 949 (4th Cir. 1970).

In the present case, the facts alleged include all the elements of malicious prosecution under Virginia law. Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 96, 244 S.E.2d 767 (1978). Furthermore, a principal may be held liable for the act of his agent in instituting a malicious prosecution "when expressly authorized, or when his authority to act may fairly be inferred from the nature and scope of the employment." Freezer v. Miller, 163 Va. 180, 199, 176 S.E. 159, 166 (1934). A sheriff is liable for the acts of his deputies. Miller v. Jones, 9 Gratt. 584, 50 Va. 584, 602-603 (1853). If the facts alleged are proven, therefore, Sheriff Harbour would be civilly liable for the acts of Miss Fain. Deputy Baliles would also be liable if he authorized those acts.

4. Va. Code Ann. §18.2-434.

5. The office of sheriff is an elected position created by the Virginia Constitution, Art. III, §4. His duties are prescribed by general law, Va. Code Ann. §15.1-40.1 (Cum. Supp. 1979), and are not subject to the control of the local political subdivision which he serves. His deputies are appointed and serve at his discretion, Va. Code Ann. 15.1-48, and like the sheriff, are not subject to the control of the governing body of the local government. Whether the sheriff is an employee of the state or the county, however, would not be dispositive of plaintiff's claims if a constitutional violation were found. The question is not by whom is the tort-feasor employed. Rather, it is whether he is carrying out official county policy of some nature. See Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658, 691 (1978); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978). If a constitutional tort had been committed and if it were committed pursuant to official county policy then the county would be liable irrespective of the immunities of the tort-feasors. Owen v. City of Independence, 48 U.S.L.W. 4389 (April 16, 1980). The requirement that action be taken pursuant to official county policy is simply not met when a sheriff or his employees, who are not subject to the control of the local political subdivision, are functioning to enforce the general criminal laws of the state. For this additional reason, plaintiff's

claims against the county are without merit.

6. A superior may be held liable for failing to supervise or train his subordinates if his dereliction is so severe as to reach the level of gross negligence or deliberate indifference to the deprivation of plaintiff's constitutional rights. See Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. denied sub nom, 100 S.Ct. 483 (1980); Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979). See generally, Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). No matter how reckless the supervision, however, the injury must be constitutionally significant.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1434

Johnny Witt,

Appellant,

v.

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff, Patrick County; Martha Sue Fain, Employee of Sheriff's Office, Patrick County; County of Patrick, Virginia,

Appellees.

No. 80-1435

Sarah B. Bowman,

Appellant,

v.

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff, Patrick County; Martha Sue Fain, Employee of Sheriff's Department; Individually and in their official capacity; County of Patrick, Virginia,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Danville. James C. Turk, Chief Judge.

Argued: December 2, 1980
Decided: February 17, 1981

Before BRYAN, Senior Circuit Judge, RUSSELL and MURNAGHAN, Circuit Judges.

Robert W. Mann (Young, Kiser, Haskins, Mann, Gregory & Young, Ltd. on brief for Appellants; Thomas T. Lawson (John D. Eure, Woods,Rogers, Muse, Walker and Thornton on brief) for Appellees Calvin Harbour and Larry E. Baliles; Anthony P. Giorno, Assistant Commonwealth's Attorney for Appellee County of Patrick, Virginia.

PER CURIAM:

Johnny Witt and Sarah B. Bowman, appellants, filed essentially identical complaints against Patrick County, Virginia, Calvin Harbour and Larry E. Baliles, respectively Sheriff and Deputy Sheriff of the County, and Martha Sue Fain, an informant, seeking damages under 42 U.S.C. § 1983. The two cases were consolidated for pretrial motions as well as for this appeal from the District Court's order of April 23, 1980, dismissing the complaints under Fed.R.Civ.P. 12(b)(6).

Specifically, appellants charged Harbour and Baliles with negligence or

recklessness in retaining Fain as an agent in their investigation of illegal drug activities in Patrick County. The complaint was that the Sheriff and his Deputy continued to use Fain despite their knowledge of her incompetence and unreliability. Appellants were arrested pursuant to warrants issued upon indictments returned by a grand jury acting on Fain's perjured testimony. The indictments were dismissed when her perjury was disclosed in pretrail proceedings.

The District Court held that appellants could not allege the unconstitutionality of arrests made under warrants issued on indictments returned by a properly constituted grand jury. Because appellants had identified no other violation of constitutionally protected rights, the Court determined it necessary to dismiss the § 1983 complaints. Baker

v. McCollan, 443 U.S. 137, 140 (1979).

We find no fault with the Court's analysis and agree that, on the facts of this case, appellants' remedies, if any, lie in actions under State law. The judgment of the District Court is therefore

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1434 (L)

Johnny Witt,

Appellant,

versus

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff Patrick County; Martha Sue Fain, Employee of Sheriff's Office, Patrick County; County of Patrick County,

Appellees.

No. 80-1435

Sarah B. Bowman,

Appellant,

versus

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff; Martha Sue Fain, Employee of Sheriff's Department; Individually and in their official capacity; County of Patrick, Virginia,

Appellees.

ORDER

FILED MAR 17 1981
WILLIAM K. SLATE, II, CLERK

Upon consideration of appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Russell, and Judge Murnaghan.

For the Court,

William K. Slate, II

CLERK